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No. 96-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

WOMEN PRISONERS OF THE DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, ET AL.,

Petitioners,

v.

DISTRICT OF COLUMBIA, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the differential treatment of incarcerated men and women is exempt from review under the Constitution's equal protection guarantee and statutes prohibiting discrimination on the basis of sex because women prisoners are alleged to share certain "special characteristics," are incarcerated in separate facilities, and make up a smaller percentage of the prison population than do men?

PARTIES TO THE PROCEEDING

The petitioners in this case are the class of women prisoners incarcerated in prisons operated by the District of Columbia. Petitioners were plaintiffs in the district court and appellees in the Court of Appeals.

The class was certified by the district court on December 1, 1993. The class is defined as all women prisoners who were incarcerated in the District of Columbia correctional system as of October 1, 1993, and all women prisoners who would thereafter be incarcerated in the D.C. correctional system. Class members were represented by thirteen "Jane Doe" plaintiffs in the district court, of whom two are now deceased, nine have been released, and two remain incarcerated.

Defendants in the district court were the District of Columbia, the District of Columbia Department of Corrections (DCDC), the District of Columbia General Hospital Commission, and the following District officials, who were sued in their official capacities: Sharon Pratt Kelly, as Mayor; Walter B. Ridley, as Director of DCDC; William M. Plaut, as Associate Director for Institutions, DCDC; Gwen H. Washington, as Associate Director for Programs, DCDC, and Acting Administrator of the Correctional Treatment Facility; John S. Henderson, as Administrator of the Central Detention Facility; Douglas Stempson, as Administrator of the Minimum Security Annex; William Hall, M.D., as Assistant Director for Health Services of DCDC; and Eliza Taylor, M.D., as Chief Medical Officer, Correctional Treatment Facility.

All parties below are parties to this proceeding.

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IN THE SUPREME COURT OF THE UNITED STATES
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No. 96 -

WOMEN PRISONERS OF THE DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, *et al.*,

Petitioners,

v.

DISTRICT OF COLUMBIA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners, the women prisoners of the District of Columbia, hereby petition this Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 93 F.3d 910. Appendix (App.) at 1a. The opinions and orders

of the U.S. District Court for the District of Columbia are reported at 877 F. Supp. 634 (App. 75a) and 899 F. Supp. 659 (App. 200a).

JURISDICTION

The judgment of the Court of Appeals was entered on August 30, 1996. App. 1a. A petition for rehearing was denied on November 14, 1996. App. 240a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, incorporated in the Fifth Amendment's Due Process Clause and thus applicable to the District of Columbia, *see Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, sec. 1.

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, provides in relevant part:

> (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any

education program or activity receiving Federal financial assistance . . . .

STATEMENT OF THE CASE

A. Introduction and Summary.

This case involves a claim by the women prisoners of the District of Columbia that they are provided inferior and unequal prison programming based on their sex, in violation of Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681, and the equal protection component of the Fifth Amendment's Due Process Clause.

The district court found that the District of Columbia Department of Corrections (DCDC) provides women prisoners markedly inferior programming in the areas of education, vocational training, work opportunities, recreation, and religion as compared to men of similar custody level and sentence structure. App. 166a-171a. It held that these inequities were in contravention of Title IX and the constitutional equal protection guarantee. App. 166a-171a, 211a-220a.

Applying a novel "threshold" step to equal protection and Title IX analysis, the Court of Appeals reversed. App. 29a. It concluded that incarcerated women and men were not similarly situated because women prisoners had certain "special characteristics," were incarcerated in separate facilities, and made up a smaller percentage of the prison population than do men. App. 30a. Accordingly, the court refused to apply any level of scrutiny under the Constitution or Title IX to review the sex-based classification that assigns male inmates to facilities with superior, quality programming, and assigns female inmates to facilities with inferior or non-existent programming.

B. Factual Background.

1. The District of Columbia lacks a correctional facility designated for women prisoners. Prior to 1992, the District paid to have most D.C. women prisoners incarcerated by the Federal Bureau of Prisons. In 1992, however, the District decided as a money-saving measure to house its women prisoners within its own local prisons—"without having planned, developed and implemented either programs or resources" for this population. App. 99a, 117a.

District officials decided to house minimum-custody women serving sentences of less than two years at an "Annex" to the men's Minimum Security Facility (Minimum) in Lorton, Virginia. Minimum-custody men serving similar sentences are housed at Minimum's main campus. App. 118a, 162a.

District officials chose to house medium-custody women serving longer sentences of two years to life at the Correctional Treatment Facility (CTF) in the District of Columbia. Medium-custody men serving similar sentences are housed at the Central, Medium, or Occoquan facilities at the Lorton Reservation in Virginia. App. 124a, 162a-163a.

CTF is a new facility designed and built as a diagnostic and treatment center for 800 special population inmates requiring intensive treatment for mental health or substance abuse problems. App. 98a. In early 1992, only months before CTF opened, District officials changed the "mental health" program to a "program for female offenders," even though the facility was not designed for long-term general incarceration. App. 98a-100a. Other than medium-custody women, the inmates at CTF are "special population" men who are there temporarily for diagnostic processing or who

participate in a volunteer twelve-month substance-abuse rehabilitation program.

There are no maximum custody women in the D.C. system.

2. The DCDC provides the inmates in its custody with a range of rehabilitative programs including basic academics, college degree classes, vocational training, apprenticeships, prison industries, work training, work details, recreation, and religion. Male prisoners are provided with more varied, more valuable, and better-equipped programming in almost all of these areas than are women serving similar sentences with similar security status. App. 116a-131a, 166a-171a.

By way of example:

Education. Medium-custody men have access to full-time B.S., B.A., and A.A. college degree programs in several subject areas. App. 125a.[1] Medium-custody women do not. *Id.*

Vocational Training. Medium-custody men have access to vocational training in fifteen different skilled areas including auto mechanics, carpentry, and plumbing, and can participate in six different apprenticeship programs. App. 126a. Medium-custody women have no apprenticeship programs open to them and their vocational training is limited to stereotypically female programs such as sewing, typing, word processing, and duplicating. *Id.*

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[1] Because medium-custody men can transfer among facilities according to their needs, they generally have access to all of the programs offered at the three medium-custody male facilities. App. 163a-164a.

Prison Industries. Medium-custody men can learn a skill and earn up to $300 a month in several industries such as garment shop, metal shop, print shop, upholstery, accounting, furniture repair, and Metro shop. App. 120a, 129a. Medium-custody women have no opportunity to work in an industry.

Work Details. Both minimum- and medium-custody male inmates are assigned to a variety of work details including: carpentry, plumbing, electrical, mechanics, dairy, painting, welding, barbering, landscaping, bricklaying, and building maintenance. App. 120a, 128a-129a. Women prisoners are not permitted to work on these trade details and instead are relegated to the stereotypically female jobs such as clerical, culinary, and housekeeping positions. App. 119a-120a, 128a.

Recreation. Male inmates of all custody levels can participate in varied and substantial recreation programs that women cannot join. App. 123a, 130a-131a. Because CTF is a controlled movement facility, the limited recreation available to medium-custody women is more like that provided to inmates in punitive segregation than that available to the general population inmates at the men's medium-security facilities. App. 130a-131a.

3. The lack of comparable programs has significant effects on the sentences served by women prisoners and the likelihood of recidivism upon release. Women are not able to earn the good time credits for participating in academic and vocational programs that men are able to accrue. App. 117a, 166a. Women are also unable to satisfy certain program requirements for parole. In addition, the increased work opportunities for men enables them to earn and save substantially more money while incarcerated. App. 117a. Women who are not able to support themselves or their children upon release are more likely to return to prison than

those who have obtained an education or learned a marketable skill. *Id.*

C. Proceedings Below.

1. On October 1, 1993, petitioners filed suit in U.S. District Court, alleging that the District of Columbia had violated Title IX and the equal protection component of the Fifth Amendment's Due Process guarantee by creating and maintaining substantial inequities in the programming offered to women prisoners as compared to men of similar custody level and sentence structure.[2]

On December 13, 1994, after a three-week trial, the district court issued an opinion in which it held that the DCDC's failure to offer women prisoners programs and opportunities comparable to those provided to male prisoners violated Title IX. App. 156a-171a.[3] In reaching that conclusion, the court compared prisoners "who are similarly situated by virtue of their similar custody levels, sentence structures and purposes of incarceration." App. 162a. The court found that women prisoners at the Annex were similarly situated to the male prisoners at Minimum, and that women

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[2] In a portion of the case not relevant to this petition, the class also alleged that the conditions of confinement of women prisoners violated the Eighth Amendment prohibition against cruel and unusual punishment and District of Columbia laws regarding the safekeeping of prisoners.

[3] On the other aspects of petitioners' complaint, the court also held that the women were subjected to a level of sexual misconduct and sexual harassment that violated the Eighth Amendment; that the women were confined under unhealthy and unsafe living conditions, also in violation of the Eighth Amendment; and that the District provided grossly deficient obstetrical and gynecological care to women prisoners in violation of Section 24-442 of the D.C. Code, reserving the question whether these deficiencies also violated the Eighth Amendment.

prisoners at CTF were similarly situated to the male prisoners at Occoquan, Central and Medium. App. 162a-163a.[4]

The district court rejected the respondents' argument that a comparison between these groups of prisoners was inappropriate because women prisoners were less violent, more likely to have been victims of sexual abuse, more likely to have problems with substance abuse, and more likely to have parenting responsibilities. App. 164a-165a. The court concluded:

> A majority of the "unique characteristics" mentioned by the Defendants are also some of the burdens which historically have prevented women from achieving equality of opportunity. To use these characteristics to defeat a comparison of men and women prisoners would vitiate Title IX and also suggest that men and women could never be compared. App. 165a-166a.

Concurrent with its opinion, the court issued an order to remedy the programming disparities that it had found. App. 186a-193a. The order takes into account the smaller size of the female prisoner population and the physical limitations of the facilities in which they are incarcerated. For example, while medium-custody men have access to ten industrial programs, the order requires medium-custody women at CTF to have access to only two. App. 190a. Similarly, while medium-custody men enjoy up to fifteen hours of recreation

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[4] The district court held that a comparison between general-population CTF women and the special populations of men at CTF would be inappropriate because the men are there either for short-term diagnostic attention or a voluntary 18-month intensive substance abuse program. "In contrast, the [women prisoners] who reside at CTF do not choose to live there" and are there for longer periods of time. App. 163a.

per day, the order requires DCDC to provide medium-custody women with only one-third that amount. App. 192a.

2. Upon motion of the District to vacate or amend, the court issued a second opinion and order on August 14, 1995. Among other things, the court modified its initial opinion to find that DCDC's decision not to provide equal work and recreation programs to women prisoners as compared to men violated the equal protection guarantee of the Fifth Amendment as well as Title IX. App. 214a-216a. The court held that respondents had not shown any important governmental objective that was served by offering women prisoners less opportunity in programming:

> To justify the inequality by pointing to the "differences in the physical structures" merely begs the question. Similarly, relying on the "proportion of men and women" does not address the differences in the quality of what the women are offered. The limited resource argument does not explain the unequal distribution of the minimal resources that are available. App. 218a.

The District of Columbia appealed. It challenged the district court's order to the extent it required DCDC to provide comparable programming to men and women prisoners in the areas of work, recreation, and religion.[5] It also challenged several specific provisions of the court's order that did not relate to programming inequities, as well as the district court's exercise of pendent jurisdiction over the local-law claims.

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[5] The District did not challenge the award of relief in the area of education and vocational training. The reasoning of the D.C. Circuit with respect to work, recreation, and religious programming, however, would apply equally to education and vocational training as well, had they been part of the appeal.

3. A divided panel of the D.C. Circuit reversed and vacated the relief ordered by the district court with respect to work, recreation, and religious programming.[6]

The panel majority refused to apply any scrutiny to the differential treatment of men and women prisoners under either equal protection or Title IX because it found that incarcerated men and women were so dissimilar as to not require comparable treatment. First, it held that incarcerated women differ from general population men of similar custody level and sentence structure because women have "special characteristics," in that most are "single-parent primary caretakers," and few "were serving sentences for violent crime." App. 30a. Second, it found the comparisons drawn by the district court to be inappropriate because there are fewer women prisoners than there are men, and the women are housed at separate facilities. App. 30a-34a.[7] Having determined that incarcerated women and men are not similarly situated, the panel majority refused to apply *any* level of scrutiny to the District's inferior treatment of women prisoners.

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[6] The divided panel also reversed the district court's exercise of supplemental jurisdiction over the local-law claims. The court instructed the district court on remand to consider the remaining provisions of its orders in light of the recently-enacted Prison Litigation Reform Act (Title VIII of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. Law. 104-134, 110 Stat. 1321, amending 18 U.S.C. § 3626). App. 45a-48a.

[7] The panel majority also criticized the district court for rejecting a comparison between general population medium-security women at CTF and CTF's special populations of men undergoing diagnostic or substance abuse treatment. App. 32a. In so doing, however, the panel overlooked the fact that, but for the women's sex, they would be housed at Central, Medium, or Occoquan. *See* App. 73a (Rogers, J., dissenting).

Judge Rogers dissented. Even if the District may properly segregate prisoners by sex, she reasoned, "it does not follow that it may segregate them by sex *into unequal facilities*." App. 60a. In her view, the majority's conclusion that the size, location and physical limitations of the women's facilities precluded comparison with men of similar custody level was "notably circular," because it permitted DCDC to "treat men and women dissimilarly and then rely on the very dissimilarity it has created to justify discrimination in the provision of benefits." App. 61a, 60a. In addition, Judge Rogers objected that the difference in population size—while relevant in determining whether men and women received "substantially equivalent" benefits—did not justify "avoid[ing] making a comparison at all." App. 62a.

Judge Rogers also faulted the majority for concluding that male and female prisoners are "categorically dissimilarly situated" without first inquiring into the purpose behind various programs. App. 68a-69a. For example, Judge Rogers agreed with the district court that minimum-custody men and women, despite the differences in their population size, are both "preparing for release into the community and therefore[] have the same need to fully prepare themselves for this stage of their lives." App. 67a.

Finally, Judge Rogers disputed the majority's assertion that application of equal protection principles to prisons would impose liability as a result of "program-by-program comparisons," and instead interpreted those principles to require only that prison officials explain the governmental purpose supporting a decision to offer non-comparable programs to men and women prisoners to ensure that such decision was not unlawfully based on sex discrimination. App. 71a.

4. Petitioners filed a petition for rehearing and suggestion for rehearing *in banc* with respect to the panel's "similarly situated" analysis. The petition was denied on November 14, 1996. Three judges dissented from the denial of the suggestion for rehearing *in banc* on the ground that the equal protection issue presented "an important question with serious implications for prisoners as well as other persons in the government's care and custody." App. 243a.

REASONS FOR GRANTING THE PETITION

Petitioners seek review of the D.C. Circuit's determination that the facially different treatment of incarcerated women and men is not subject to scrutiny under equal protection analysis and Title IX.[8] The decision of the Court of Appeals is in conflict with the decisions of other Circuits and presents an important question of federal law.

A. The Circuits Are Split As To Whether the Different Treatment of Men and Women Prisoners Is Subject to Scrutiny Under the Equal Protection Clause and Title IX.

The decision below exacerbates the split in the circuits as to whether the facially different treatment of men and women in prison is subject to review under either the equal protection

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[8] Although other aspects of the case have been remanded to the district court for consideration in light of the Prison Litigation Reform Act, *see supra* note 6, the portion for which petitioners seek review in this Court is final. The Court of Appeals reversed, vacated, and fully disposed of the portions of the district court's opinion and order relating to work, recreation and religious programming. There are no further proceedings as to these claims, which are distinct from the remainder of petitioners' case.

clause or Title IX. The D.C. Circuit has now joined the Eighth Circuit in refusing to apply any scrutiny under the equal protection clause to sex discrimination in prison programs and services, based on the court's threshold determination that male and female prisoners are not similarly situated. The D.C. Circuit has also invoked this analysis to foreclose any comparison of the programming afforded men and women prisoners under Title IX. App. 29a.

This approach is contrary to that of the majority of circuit courts, which have scrutinized the disparate treatment of men and women in prison notwithstanding differences between the male and female prison populations. These courts have refused to substitute a "similarly situated" threshold test for the substantive analysis required by Title IX and the equal protection clause.

In the decision below, the D.C. Circuit expressly follows the Eighth Circuit's ruling in *Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1177 (1995), which adopted a similarly situated "threshold test" that precluded equal protection scrutiny. In *Klinger*, the Eighth Circuit refused to apply heightened scrutiny to Nebraska's treatment of women prisoners on the grounds that the women, who were incarcerated in the state's only women's prison, failed to demonstrate that they were similarly situated to male inmates in one of the state's four men's prisons. The court noted that the men's prison selected for comparison was much larger, housed inmates with longer average sentences, and had a higher security classification than the women's prison. *But see id.* at 735-36 (McMillian, J., dissenting) (asserting that the disparities in programming were based on sex, not custody level or sentence length). In addition, the court relied on the distinguishing "special characteristics" of female inmates as single parent primary

caretakers, sexual and physical abuse victims, and non-violent offenders.

As a result, the Eighth Circuit, like the D.C. Circuit here, found that equal protection did not require that the programs provided to women in prison be comparable to those provided to men. *Klinger*, 31 F.3d at 733; *see also Pargo v. Elliott*, 894 F. Supp. 1243, 1261 (S.D. Iowa 1995) (rejecting equal protection challenge to disparities in prison programming because women and men prisoners are not similarly situated with respect to population size, security level, type of crime, sentence length and "special characteristics"), *aff'd*, 69 F.3d 280 (8th Cir. 1995), *cert. denied*, 117 S. Ct. 98 (1996). The *Klinger* ruling was subsequently extended to Title IX as well. *See Klinger v. Nebraska Dep't of Correctional Servs.*, 887 F. Supp. 1281, 1282 n.1 (D. Neb. 1995) (finding the Eighth Circuit's holding equally applicable to Title IX claims, while expressing "respectful[ ] disagree[ment]" with that holding).

The Eighth Circuit has since expanded *Klinger* to foreclose a system-wide comparison of the prison industries available to men and women, relying in part on the D.C. Circuit decision below. *Keevan v. Smith*, 100 F.3d 644, 648-49 (8th Cir. 1996). In *Keevan*, the court rejected an equal protection challenge to the disparate opportunities available to men and women throughout the state's prison system on the grounds that male and female prisoners are not similarly situated due to average differences in population size, sentence length and security level. *See id.* at 652 (Heaney, J., dissenting) (suggesting that, "despite our admonition to the contrary," *Klinger* "'stand[s] for the proposition that women and men prison inmates can never be similarly situated for purposes of equal protection analysis'") (citation omitted).

Thus, in the D.C. and Eighth Circuits, the differential treatment of male and female prisoners—however unequal it

may be—is not subject to review under the equal protection clause or Title IX because these courts have held that certain group-based differences (including parental responsibilities, propensity to violence, and population size) preclude comparison of the two populations. Under this "threshold" approach, the government is under no obligation to establish any relationship between the asserted "special characteristic" and the differential treatment.[9]

In contrast, the majority of circuit courts confronted with a challenge to the disparate treatment of men and women in prison have undertaken the analysis required by Title IX and equal protection despite certain group-based differences between the sexes. Under this approach, the differences between the male and female prison population are taken into account, if at all, only in the context of scrutinizing the government's justification for treating the sexes differently. Thus, group-based differences are used not to avoid comparison completely but rather to determine whether the government has a compelling reason for engaging in disparate treatment on the basis of sex.

In a decision directly contrary to that below, the Ninth Circuit has held that Title IX requires prison education programs to be equally available to male and female prisoners. In *Jeldness v. Pearce*, 30 F.3d 1220, 1228 (9th Cir. 1994), the court applied Title IX to sex-based disparities in prison programming despite differences in the location and population size of the men's and women's prisons. While recognizing that the district court on remand would have to take these

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[9] The D.C. Circuit, for example, did not require DCDC to explain why the fact that women prisoners in general have parenting responsibilities and are convicted for non-violent crimes supports the decision to offer them inferior programming as compared to men.

differences into account, the Ninth Circuit held that women prisoners still must have "equal opportunity to participate in programs of comparable quality" to those offered to men. *Id.* at 1229. In addition, the court held that the prison's policy of paying merit pay for vocational work to men but not women prisoners constituted disparate treatment in violation of Title IX. *Id.* at 1231.

Similarly, in *Canterino v. Wilson*, 875 F.2d 862, 1989 U.S. App. LEXIS 4789 (6th Cir.) (unpublished opinion),[10] *cert. denied*, 493 U.S. 991 (1989), the Sixth Circuit held that the equal protection clause requires parity in male and female inmates' access to legal facilities. Applying heightened scrutiny, the court stated:

> [t]he fourteenth amendment "requires, even in the context of prison conditions, that any such disparity [between the treatment of male and female inmates] must 'serve important governmental objectives' and must be 'substantially related to achievement of those objectives.'" App. 251a (alteration in the original) (citations omitted).

Like the Sixth and Ninth Circuits, the Seventh Circuit has also applied heightened scrutiny to the different treatment of male and female prisoners, without first engaging in a threshold inquiry as to whether there are differences between the two groups. In *Madyun v. Franzen*, 704 F.2d 954 (7th Cir. 1983), *cert. denied*, 464 U.S. 996 (1983), the court reviewed a prison policy permitting female and male guards to frisk male prisoners, but only female guards to frisk female prisoners. Although the court upheld the policy as substantially related to the important interest in promoting women's employment opportunities, it distinguished the policy

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[10] Reprinted in the Appendix at 244a.

at issue from the provision of unequal educational, recreational and vocational programs, recognizing that, "[c]learly, male and female inmates must receive substantially equal facilities and conditions while in prison." *Id.* at 962 (citations omitted); *see also Betts v. McCaughtry*, 827 F. Supp. 1400 (W.D. Wis. 1993) (applying heightened scrutiny to male prisoners' equal protection challenge with respect to differential grooming privileges), *aff'd*, 19 F.3d 21 (7th Cir. 1994).

In addition, the Fifth Circuit, while reserving the question of whether a lower level of equal protection scrutiny may be appropriate in the prison context,[11] applied heightened scrutiny to a policy prohibiting male inmates from enrolling in classes at a women's prison, and did not undertake any threshold inquiry as to differences between male and female prison populations. *Smith v. Bingham*, 914 F.2d 740 (5th Cir. 1990), *cert. denied*, 499 U.S. 910 (1991). The Fifth Circuit recognized that the challenged policy "facially classifies on the basis of gender," *id.* at 741, and therefore was subject to

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[11] The majority of courts that have addressed this question have determined that this Court's ruling in *Turner v. Safley*, 482 U.S. 78 (1987)—which held that prison regulations that impinge on an inmate's personal rights need only survive a rational basis test—does not apply to claims of gender discrimination brought under the equal protection clause. *See Pitts v. Thornburgh*, 866 F.2d 1450, 1453-55 (D.C. Cir. 1989); *Pargo v. Elliot*, 49 F.3d 1355, 1357 (8th Cir. 1995); *McCoy v. Nevada Dep't of Prisons*, 776 F. Supp. 521, 523-24 n.2 (D. Nev. 1991). *But see Klinger*, 31 F.3d at 732.

This question is not presented in this case, as the D.C. Circuit did not rely on *Turner* to foreclose heightened scrutiny, and did not overrule its decision in *Pitts*, which determined that *Turner* did not apply to equal protection claims. *See* App. 34a (citing *Turner* only for the general proposition that federal courts must give deference to prison administrators).

equal protection scrutiny, but found the policy substantially related to the important state interest in maintaining prison security. *Id.* at 742-43.

Consistent with the Fifth, Sixth, Seventh and Ninth Circuits, numerous district courts have interpreted the constitutional equal protection guarantee to require scrutiny of sex-based disparities in the treatment of male and female inmates, despite differences between male and female prisoners as a group. *See, e.g., West v. Virginia Dep't of Corrections*, 847 F. Supp. 402, 407-408 (W.D. Va. 1994); *Casey v. Lewis*, 834 F. Supp. 1477, 1550-51 (D. Ariz. 1993); *McCoy v. Nevada Dep't of Prisons*, 776 F. Supp. 521, 523-25 (D. Nev. 1991); *McMurray v. Phelps*, 533 F. Supp. 742, 767-68 (W.D. La. 1982), *overruled in part on other grounds by Thorne v. Jones*, 765 F.2d 1270 (5th Cir. 1985); *Dawson v. Kendrick*, 527 F. Supp. 1252, 1317 (S.D. W. Va. 1981); *Bukhari v. Hutto*, 487 F. Supp. 1162, 1171-72 (E.D. Va. 1980); *Batton v. North Carolina*, 501 F. Supp. 1173, 1176 (E.D.N.C. 1980); *Glover v. Johnson*, 478 F. Supp. 1075, 1078-79 (E.D. Mich. 1979); *Mitchell v. Untreiner*, 421 F. Supp. 886 (N.D. Fla. 1976).

The dissension between these courts and the D.C. and Eighth Circuits demonstrates the need for this Court's guidance regarding the proper application of equal protection and Title IX principles in this context.

B. This Case Raises Important Issues of Federal Law Concerning Whether a Government May Rely on Group-Based Differences Between Men and Women to Avoid Any Scrutiny of Sex-Based Discrimination.

1. The D.C. Circuit Ruling Sets a Harmful Precedent Inconsistent With Decisions By this Court.

The decision below marks a significant departure from two decades of this Court's equal protection jurisprudence requiring governments to demonstrate "an exceedingly persuasive justification" for the facially different treatment of men and women. *See United States v. Virginia*, 116 S. Ct. 2264, 2274 (1996) (*VMI*); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136-37 & n.6 (1994); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273 (1979); *see also Craig v. Boren*, 429 U.S. 190, 197 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"). If allowed to stand, it would insulate from scrutiny a government's unequal treatment of men and women whenever the government articulates group-based differences between the men and women compared, regardless of the tenuousness of the connection between these differences and the reasons for the unequal treatment.

In particular, the panel decision defies and distorts this Court's recent ruling in *VMI*. The panel's reliance on differences between the male and female prison populations as an excuse for not applying any level of scrutiny to the unequal prison programs and services provided to men and women contravenes this Court's admonition that "'all gender-based classifications today' warrant 'heightened scrutiny.'" *VMI*, 116 S. Ct. at 2286 (quoting *J.E.B.*, 511 U.S. at 136). Unlike the D.C. Circuit, this Court in *VMI* applied "skeptical

scrutiny" to the government's different treatment of men and women despite the existence of average differences between the male and female populations compared. *See id.* at 2279 (discussing district court's "'findings' on 'gender-based developmental differences'"); *id.* at 2280 (acknowledging that the state's evidence of "average capacities or preferences of men and women" was not challenged).

In addition, the D.C. Circuit permitted generalizations about men and women as a group to justify providing women prisoners across the board with inferior programming, defying this Court's direction that "generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description." *VMI*, 116 S. Ct. at 2284 (emphasis in original).[12] The D.C. Circuit also disregarded this Court's requirement that the government bear the burden of proving an "'exceedingly persuasive'" justification for sex-based disparities, *id.* at 2275, and instead upheld the different treatment based on men and women prisoners as a group. *See* App. 59a-60a (Rogers, J., dissenting) (noting the government's failure to supply any reason supporting the sex-based disparities in prison programming).

In attempting to reconcile its ruling with *VMI*, the D.C. Circuit grossly misconstrued that decision. The panel read *VMI* to authorize a comparison of the different treatment

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[12] *See also Craig v. Boren*, 429 U.S. 190, 201 (1976) (striking down state law setting different drinking ages for men and women even though gender-based differential was "not trivial in a statistical sense"); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975) (invalidating Social Security Act provision authorizing benefits for widows but not widowers, even though underlying generalizations were "not entirely without empirical support").

afforded men and women in single-sex institutions only where the populations compared are nearly the same size, relying on the similarity of enrollment at VMI and Mary Baldwin College. Such an interpretation does not comport with this Court's focus on the denial of equal opportunity to individual women, *VMI*, 116 S. Ct. at 2282, nor is it consistent with the *VMI* ruling itself. Although enrollment at Mary Baldwin College is roughly equivalent to that of VMI, enrollment in the Virginia Women's Institute for Leadership (VWIL)—the separate "parallel" program for women which the Court compared to VMI—is far smaller. *Compare id.* at 2270 (1300 men enrolled in VMI) *with id.* at 2272 (VWIL open to 25-30 women). Under the D.C. Circuit's reading of *VMI*, Virginia could have avoided equal protection scrutiny altogether had it located the VWIL program at a smaller college with even fewer offerings. Nothing in this Court's opinion countenances such a result.[13]

The panel's use of group-based differences to avoid altogether the application of heightened scrutiny to the different treatment of women prisoners departs not only from *VMI*, but also from the entirety of this Court's equal protection jurisprudence. On those occasions where this Court has ultimately found that men and women are not similarly

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[13] In addition, the D.C. Circuit placed undue weight on the discrepancy in financial resources allocated to VMI and VWIL in an effort to distinguish *VMI* from the present case. App. 33a-34a. In fact, although VMI had a much larger endowment than VWIL, Virginia had committed to provide equal financial support to in-state students attending both VWIL and VMI. *VMI*, 116 S. Ct. at 2273, 2285. Moreover, the disparity in financial reserves was only one of many aspects in which the Court found the two programs unequal. *Id.* at 2282-84. As the Court's emphasis on the intangible indicia of inequality between the two programs demonstrates, financial parity between VWIL and VMI would not have changed the result in the case. *Id.* at 2285-86.

situated with respect to a sex-based classification, it has done so only after requiring the state to justify the classification under heightened scrutiny. *See, e.g.*, *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 473 (1981) (holding gender-specific statutory rape law sufficiently related to state's important interest in preventing teenage pregnancy); *Rostker v. Goldberg*, 453 U.S. 57, 79 (1981) (upholding male-only draft registration as substantially related to important interest in raising and supporting armies where Congress had excluded women from combat); *see also* App. 68a (Rogers, J., dissenting) (noting that *Rostker* involved that "rare situation" where every member of the excluded class is identically situated with respect to the governmental purpose).

Contrary to the D.C. Circuit's approach, the determination of whether men and women are similarly situated has never been a "threshold" inquiry to be determined prior to and in lieu of heightened scrutiny.[14] App. 68a (Rogers, J., dissenting). Rather, once a court determines that the challenged classification is based on sex, as it was here, it must apply heightened scrutiny in order to determine whether men and women are similarly situated with respect to the government interests underlying the different treatment. Indeed, the very purpose of heightened scrutiny is to

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[14] The panel mistakenly relied on *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), to support the use of a similarly situated analysis as a threshold test that must be satisfied prior to the application of equal protection scrutiny. App. 28a. However, in *Cleburne*, this Court applied equal protection scrutiny to invalidate a zoning ordinance that imposed different housing requirements on the mentally retarded, despite its acknowledgement of differences between the mentally retarded and other persons. 473 U.S. at 448. Had this Court invoked a similarly situated threshold test like the panel below, it would have upheld the zoning ordinance without applying equal protection scrutiny based on differences in the populations compared.

determine whether men and women are similarly situated *with respect to the treatment at issue*, not whether there are any differences between men and women at all.

The panel's extension of its similarly situated analysis to Title IX claims is also inconsistent with this Court's precedent, and has unsettling ramifications for Title IX jurisprudence generally. In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), this Court recognized an implied right of action under Title IX, upholding a claim brought by an older female complainant who was excluded from a medical school because of her sex. At the same time, the Court acknowledged that the incidence of interrupted higher education was more common among older women than older men, and that women represented a far smaller percentage of medical students than men. *Id.* at 680 & n. 2. Under the D.C. Circuit's reasoning, the Title IX claim would have been dismissed based on a threshold determination that male and female medical school applicants were not similarly situated.

The importation of such a similarly situated "threshold inquiry" into Title IX is wholly unsupported by the language of the statute, and would eviscerate the statute's protection. In the context of intercollegiate athletic opportunities, for example, courts have uniformly required equal athletic opportunity under Title IX without first undertaking a determination of whether male and female athletes are similarly situated. *See, e.g., Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994); *Kelley v. Board of Trustees*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993); *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993); *see also* 34 C.F.R. § 106.41 (1996) (permitting sex-separate athletic teams under certain circumstances, but requiring equal athletic opportunity for both sexes). Under the D.C. Circuit's

analysis, however, a court could avoid application of Title IX in this context simply by noting the different numbers of male and female athletes, their use of different facilities, and any "special characteristics" of each group. Such a result is irreconcilable with the letter and spirit of Title IX.

2. The Ruling Below Would Permit A Government to Discriminate on the Basis of Sex Whenever It Can Articulate Group-based Differences Between the Sexes.

The similarly situated threshold test adopted by the majority below forecloses any inquiry into whether the government can demonstrate an "exceedingly persuasive justification" for the different treatment of men and women. *See Hogan*, 458 U.S. at 724 Instead, this decision permits the so-called "special characteristics" of women as a class to justify the provision of inferior educational, vocational, work and recreation opportunities, despite the absence of any logical connection between this inferior treatment and the asserted group-based differences. As noted by the judges dissenting from the denial of petitioners' suggestion for rehearing *in banc*, this ruling has "serious implications for prisoners as well as other persons in the government's care and custody," App. 243a, and would appear to apply to racially based different treatment as well. *See J.E.B.*, 511 U.S. at 128-29 (applying equal protection precedent addressing race-based peremptory strikes to peremptory strikes based on gender, and recognizing that such precedent is "premised on equal protection principles that apply equally to gender discrimination"); *cf. Harris v. Forklift Sys.*, 510 U.S. 17, 25-26 (1993) (Ginsburg, J., concurring) (relying on Title VII race discrimination precedent in Title VII sex discrimination case).

In addition to sanctioning the use of sex-based stereotypes to justify sex discrimination generally, the decision below will

have far-reaching implications for any equal protection (or statutory nondiscrimination) claim in which a disadvantaged class is not challenging its "separate" treatment, but whether that treatment is "equal." Under the rationale adopted by the D.C. Circuit, once prisoners (and presumably schoolchildren, student-athletes, patients and others) are placed in separate facilities on the basis of their sex, they can no longer claim a right to equal services or programs because they are no longer "similarly situated." Such a precedent has the potential to unravel the important legal protections that have developed under Title IX and the equal protection guarantee of the Fifth and Fourteenth Amendments.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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